

**Written evidence from the Northumbria Centre for Evidence and Criminal Justice Studies,
School of Law, Northumbria University**

Professor Tim J Wilson (corresponding author), Dr Michael W Stockdale (Director, NCECJS), Adam Jackson (Deputy Director, NCECJS), Sophie Carr, Gemma Davies, Derek Johnson and Emma Piasecki (members NCECJS)

Executive Summary

1. Forensic biometric sharing within the EU (Prüm) is a specialist form of cooperation. Nevertheless research into this activity and the context in which it occurs places some of the implications of Brexit into sharp relief:

- a) Brexit (in any form) will not result in a major reduction in the need for effective criminal justice and security cooperation. The UK will still receive millions of foreign citizens a year and a very small proportion of them will be serious criminals who present major threats. The challenge is to identify this small group within the generally law-abiding and tax-paying crowd.
- b) The effectiveness, continued extension and form of such cooperation will also have a major impact on the safety and rights of UK citizens abroad, whether they are in the diaspora or simply travelling for work or holidays.
- c) The value of individual criminal justice and security cooperation agreements (however good) will only be realised fully within a comprehensive framework (e.g. with access to the European Arrest Warrant (EAW)) that is underpinned institutionally (e.g. by Europol and Eurojust) and subject to parliamentary and legal scrutiny.
- d) UK global economic and political status was significantly reduced on 23rd June and a badly handled Brexit will further diminish this country's influence. There will be little or no scope for UK bespoke arrangements for police and judicial cooperation or scientific standardisation.
- e) The resilience of both UK science and technology, and our criminal justice system – including responses to transnational cybercrime - are likely to be weakened significantly if British forensic scientists are no longer influential within EU collaborative scientific research, professional working groups and standardisation decisions.

Opting-out of the EU arrangements, such as Prüm, the European Criminal Records Information System (ECRIS) and EAW, to which the UK belongs only after recent Protocol 36 reviews by criminal justice professionals, government and Parliament would be inexplicable and may prove to be reckless.

Introduction

2. NCECJS is a multi-disciplinary research centre, bringing together academics and postgraduate students from a range of disciplines with members of the judiciary, lawyers, police officers and forensic scientists. We are mainly based in North East England, but NCECJS has an extensive network of national and international members.¹ We work closely with public bodies and office holders,

¹ <https://www.northumbria.ac.uk/about-us/academic-departments/northumbria-law-school/research/northumbria-centre-for-evidence-criminal-justice-studies/>

including the English and Irish Law Commissions, and the Forensic Science Regulator. NCECJS has recently been awarded international joint research council funding for research into the probative and human rights implications of cybercrime investigations. This follows earlier research about the international sharing of forensic bioinformation.²

3. This evidence summarises research published in recent publications (both academic journal articles and a contribution to The Chief Scientific Adviser's Report for 2015). Copies of these publications are accessible to the Committee's Secretariat.

4. The views expressed in this memorandum are solely those of the authors and do not indicate agreement or acceptance by either our employer or research funders.

The context of police and judicial cooperation

5. Our research has largely focused on European police and judicial co-operation involving the sharing of forensic biometric data (DNA and fingerprints). This is because the EU/EEA and Switzerland is the only area of the world where (a) extensive and efficient multi-national and high volume casework cooperation exists and (b) takes place in a manner that is relatively accountable through judicial, regulatory (Data Protection) and parliamentary supervision. Such cooperation is not only of immediate value. Its development provides important lessons for the challenges posed by other forms of crime, especially fast evolving transnational cybercrimes, where the English law of evidence must adapt itself to managing and sharing evidence that may rely on expert testimony about actions in other jurisdictions.

6. The reasons why such cooperation makes a critical contribution to crime prevention and bringing offenders to justice will not change with Brexit.

7. The numbers will fluctuate and the accuracy of estimates will vary, but some 8% of the UK resident population are foreign nationals (some 4% nationals of other EU states) and there is a British diaspora equivalent to about 10% of its resident population. These figures, however, are dwarfed by total annual movements in and out of this country equivalent to approximately four times its resident population. Brexit *per se* is most unlikely to make any difference to the global vulnerability of UK citizens at home and abroad to serious or organised crime (including terrorist offences). In the judgement of a senior National Crime Agency official 'acting alone to counter crime has become unworkable'.³ Opting-out of the EU arrangements to which the UK now belongs only after detailed Protocol 36 reviews by criminal justice professionals, government and Parliament would seem both inexplicable and, given the views expressed by the relevant ministers in the Cameron Government, in particular the then Home Secretary, may prove to be reckless.

8. Freedom of movement within the EU has not affected UK English crime trends. Analyses of pre-2014 offender data have shown that EU nationals accounted for approximately 1% of detected offending in England, but subsequent publicly reported crime figures (recorded crime and the British

² For project details, disclaimers and funding, see T. J. Wilson, 'Criminal Justice and Global Public Goods: The Prüm Forensic Biometric Cooperation Model', *The Journal of Criminal Law*, 2016, 80 (5) 326.

³ P. Merrill, 'The Changing Nature of Crime', in M. Peplow (ed.), *Annual Report of the Government Chief Scientific Adviser 2015: Forensic Science and Beyond: Authenticity, Provenance and Assurance: Evidence and Case Studies* 56.

Crime Survey) continue to show a downward trend in traditional crime.⁴ With the exponential growth of transnational cybercrime⁵ and the probably irremediable physical vulnerability of UK borders (as demonstrated by the Home Affairs Committee⁶), more extensive migration restrictions following Brexit would be unlikely to measurably improve crime (including terrorist offences) prevention. The key to responding to global threats will continue to be effective information sharing with other countries. Where this works, the existing arrangements need to be consolidated and, subject to maintaining accountability, extended to other countries.

9. The same considerations apply to bringing to justice transnational offenders for crimes on British soil. The most significant differences between a crime committed by EU citizens such as Zalkans⁷ or Dlugosz,⁸ however, and the Russian citizens named in the Litvinenko Inquiry is that a UK investigation can currently benefit from a duty on EU member state to assist our police or judicial inquiries and the extradition of suspects cannot be blocked by a 'wall of protection'.⁹ This is not only a potential problem in respect of authoritarian states that cannot effectively be held accountable to their citizens and flout modern conceptions of the rule of law. Prior to its adoption of the European Arrest Warrant a Polish suspect could not be extradited (technically rendered) from Poland. Under the Polish Constitution this remains the only lawful extradition process for its citizens.¹⁰

The purpose and options for international forensic biometric data sharing

10. The purposes of forensic biometric cooperation are twofold:

- a) identifying known individuals, monitoring the movement of unknown individuals between crime scenes and identifying collaborative criminal networks¹¹; and
- b) enabling judicial and police records to be joined-up between jurisdictions.

These are important elements of an increasingly comprehensive and cost effective system that provides for seamless policing and judicial cooperation, significantly reducing the ability of transnational offenders to take advantage of jurisdictional boundaries.

11. Published research has concentrated on forensic data exchanges leading to suspect identification and, in the absence of identification, the transnational crime trails of unknown individuals (both forms of 'sub-source attribution'). Access to criminals' back-stories – if the records exist in an efficiently searchable form - can sometimes only be unlocked through sharing standardised biometric data between jurisdictions. Bail, the admissibility of evidence of bad character and sentencing decisions require knowledge of criminal careers. This is not only a question of

⁴ D. Johnson 'E.U. migrant criminal activity: Exploring spatial diversity and volume of criminal activity attributed to inter EU migrants in England', *Applied Geography* 2014 50 55; for data inadequacies (both national and EU levels) see also Ludwig, A. & Johnson, D. (2016) Migration and crime: a spatial analysis in a borderless Europe, *European Journal of Policing Studies*. 4 (1).

⁵ A Blyth and M Johnson, 'Cyber Forensics' in M. Peplow, above n.3 at 74-79.

⁶ HC 2016–17, 24 paras 27-33.

⁷ For this murder and the importance attached by the Coroner to police cooperation see S Swinford 'Alice Gross: Coroner demands checks on foreign suspects after finding teenager was 'unlawfully killed' by Latvian builder', *The Daily Telegraph*, 4th July 2016.

⁸ *R v.Dlugosz, Pickering and Pontius* [2013] EWCA Crim 2 [31] – [38].

⁹ HC 2015-16 695 para. 9.179.

¹⁰ The authors are grateful to Dr K. Andrejuk, IFiS, Polish Academy of Sciences for briefing about this.

¹¹ Wilson, 'The Global Perspective' in M. Peplow, above n.3 84-85.

criminological efficiency, or even public safety. Where prior convictions may influence pre-trial detention, the verdict and punishment, the law cannot be administered equitably if prosecuting agencies and courts can access records relating to their fellow citizens, but not those of foreign residents or visitors.

12. As the Metropolitan Police explained in connection with their arrest of Zalkans five years before the murder of Alice Gross, it was not possible to carry out checks on all foreign nationals because some EU nations did not have a criminal record database.¹² This is being remedied under ECRIS which requires all member states to create such databases and share the information they contain about EU citizens. The Commission is supporting implementation financially and is also seeking to expand the system to include third country nationals convicted in the EU. ECRIS may also facilitate safeguarding. Subject to what is permitted under national law, conviction information may be exchanged for screening prior to work with children. A key issue in the Bichard Report (2004) into the failures behind the Soham murders was 'the wealth of information held but not exploited by police forces for the prevention and detection of crime'. ECRIS and Prüm participation extends some of the approaches recommended in that report to take account of the increasingly large-scale and global mobility in the UK described in paragraph 7 of this memorandum.¹³

13. The juxtaposition in this evidence of Prüm and ECRIS demonstrates how EU arrangements are part of a holistic response to some of the worst negative spillovers from globalisation. The comparative success of the EU in creating and implementing such arrangements is clear from comparisons with both Interpol's forensic biometric data sharing systems (hardly used in comparison with Prüm) and, as a similarly complex personal data screening system, the UK e-borders project.¹⁴ The success of Prüm stems from a number of reasons, but key factors include:

- a) An international legal framework that respects national political and legal autonomy over the regulation and use of sensitive personal data in a manner that can be effectively supervised by national courts. Also the governance of the system's operation – through the participation of national data regulatory bodies or officials - remains at a national level.
- b) A legal obligation to create (the Zalkans issue) national criminal justice databases that operate in a technologically standardised manner, with Commission and other institutional resources to support implementation.
- c) How Prüm operates within a comprehensive framework for legal cooperation (eg the EAW to ensure rendition subject to ECHR compliance after identification) and, in marked contrast to Interpol, parliamentary and judicial scrutiny nationally and internationally.
- d) The collaborative problem solving during implementation by EU institution officials (especially Europol and Eurojust) and their colleagues from the two lead scientific and technical national agencies (Dutch forensic scientists and German data system experts) together with participating national police officers, lawyers, prosecutors and magistrates.

14. The selected technical solution of dispersed databases – ie controlled interconnectivity between national databases - and not a centralised data system on the Interpol model may be less significant

¹² See S. Swinford, n.7.

¹³ The Bichard Inquiry Report, HC 2003-04 653 para 130.

¹⁴ For statistical data comparisons with Interpol systems and e-borders and the analysis of Prüm in terms of project delivery see: Wilson, n.2 at 317-321.

than the other factors. EU institutions have also successfully introduced high volume centralised systems for border control purposes. All of these contain and make use of forensic biometric data and are accessible to member states for criminal justice or security purposes. There is a significant distinguishing factor, however, all EU centralised systems, with the exception of the Schengen Information System, hold data exclusively about third country nationals, though potentially, post-Brexit, also UK citizens.

15. Such policing and judicial cooperation is highly consistent with the development of UK law and policy on extradition and extra-territorial jurisdiction from the nineteenth century onwards. In contrast to many other jurisdictions (some still today), British citizens were not allowed to hide behind its borders to evade justice for serious crimes committed abroad. One rationale for this approach was stated in the Scott Baker Review:

... extradition operates on the basis of mutual benefit and obligations. Given the ease of movement of people throughout the world, the United Kingdom needs the help of the international community to fight serious crime within its borders, just as much as other states need the assistance of the United Kingdom to deal with crime affecting their interests.¹⁵

Arguably, however, such cooperation is not simply a matter of mutual advantage. The deontological and retributive (legal, moral and social) significance of the criminal law gives rise to an obligation to assist the detection of crimes committed by British citizens abroad and efforts to bring them to account. Continued involvement with such police and judicial arrangements post-Brexit would, therefore be wholly consistent with this long-established tradition.

16. Much greater political problems could arise in respect of security screening systems. After Brexit the price of a summer holiday in Spain for a British citizen might include the retention of personal information on a centralised EU data system. That data could be used by a policeman or border guard anywhere in the EU, without the accuracy and use of the data being subject to any UK national governance or justiciability in our courts.

Risks and costs of forensic biometric cooperation

17. Because sensitive personal data is exchanged through Prüm the principal legal question is whether this arrangement is proportionate and strikes a fair balance between the competing public and private interests. Arguably the Prüm legislation of 2008 evades this issue. It is a simple but highly effective framework that sets the data protection and technical or scientific baselines for participation. Anonymous DNA and fingerprint data – shared and selected via automated data - processing will only be linked to a named person following human scrutiny and approval if such sharing of information is permitted under the national laws of the state holding that data. The EU legislation emphasis on the primacy of national law is not original in this respect. It is similar, for instance, to the rules under the Rome Statute of the International Criminal Court (ICC) (1998) for information sharing between the tribunal and signatory states, including the UK.

18. The cost of sharing national DNA data internationally is low. Various risks occur because of technological obsolescence or disparities between national biochemical systems as DNA databases become larger and are interconnected via Prüm. Changes to resolve these problems have also

¹⁵ *A Review of the United Kingdom's Extradition Arrangements*, Home Office, London: 2011), 10.

improved purely national investigations. The new internationally standardised upgrades of DNA biochemistry have also increased what could be detected from degraded and incomplete DNA. The key issue, however, was that this progress needed to proceed globally in the same direction to make cross-country compatibility more reliable and less expensive. The Commission reduced the risks of future technological obsolescence and spread the costs of biochemistry modernisation for EU member states by funding in partnership with US bio-science companies considerable convergence between the European forensic DNA biochemistry with that of the USA and China. The UK, as a major partner and innovator in this process, however, benefited considerably from what became global convergence (development through in effect a tightly synchronised tri-continental process) towards this country's core biochemical standards.¹⁶ This will assist UK criminal justice cooperation activity outside Europe and with the identification of bodies following a natural disaster or mass murder.

19. Brexit poses two problems that need to be addressed in this respect. It is inconceivable that UK forensic science will influence or even keep up with global practice to the same extent if it has to rely solely on a shrinking UK forensic science base. Citing concerns expressed by the Science and Technology Committee, the leading Metropolitan Police forensic scientist recently commented:

... [the] situation has reached a low point in the last five years, with a small and fragmented research base in forensic science that does not allow for the effective development and implementation of large-scale innovation and the application of new science.¹⁷

Similarly, British influence over international work to assist lawyers and judges to better assess the reliability of scientific expert evidence (this is very much work in progress as the appreciation /interpretation of reliability varies between disciplines¹⁸) risks being lost if UK scientists can no longer work on criminal investigations in other EU countries, within EU collaborative projects and have a major regional influence over international standardisation. This risk applies generally to scientific evidence, including the recent and fast growing area of cybercrime.

15 November 2016

¹⁶ Wilson, n. 2 at 315-318 and also n.11 at 86-87.

¹⁷ G. Pugh, 'Forensic Science in Practice' in M. Peplow above, n.3 at 28.

¹⁸ S. Carr, E. Piasecki, G. Tully and T. J. Wilson, 'Opening the Scientific Expert's Black Box: 'Critical Trust' as a Reformatory Principle in Criminal Evidence', *The Journal of Criminal Law* 2016, 80 (5) 364-386.